

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Amendment of Parts 1, 21, 73, 74 and 101 of)	WT Docket No. 03-66
the Commission's Rules to Facilitate the)	RM-10586
Provision of Fixed and Mobile Broadband)	
Access, Educational and Other Advanced)	
Services in the 2150-2162 and 2500-2690)	
MHz Bands)	
)	WT Docket No. 03-67
Part 1 of the Commission's Rules - Further)	
Competitive Bidding Procedures)	
)	MM Docket No. 97-217
Amendment of Parts 21 and 74 to Enable)	
Multipoint Distribution Service and the)	
Instructional Television Fixed Service)	
Amendment of Parts 21 and 74 to Engage in)	
Fixed Two-Way Transmissions)	
)	WT Docket No. 02-68
Amendment of Parts 21 and 74)	RM-9718
of the Commission's Rules With Regard to)	
Licensing in the Multipoint)	
Distribution Service and in the)	
Instructional Television Fixed Service for the)	
Gulf of Mexico)	

**COMMENTS OF
NEXTEL COMMUNICATIONS**

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Executive Summary

The 2.5 GHz spectrum holds the promise of providing consumers integrated access to voice, high-speed data, video-on-demand, and interactive delivery services in competition with well-established wireline and cable broadband services. While BRS-EBS spectrum represents just one portion of the radio spectrum suitable for broadband, the Commission can remove regulatory uncertainty that has largely discouraged investment and innovation in the 2.5 GHz band by establishing a clear and minimally intrusive regulatory framework for BRS and EBS services.

The Commission should take the next step in reforming the regulatory regime for this band by establishing a “substantial service” performance requirement for licensees. At the same time, the Commission should recognize that it has just ordered a massive – and massively complex – reconfiguration of the BRS-EBS spectrum. To allow licensees a fair opportunity to meet a substantial service obligation, the Commission should measure substantial service five years after the transition is complete. The Commission should also measure substantial service on a system-wide, rather than a channel-by-channel basis. A channel-by-channel measurement would yield peculiar results at odds with the band’s unique licensing history and the consumer offerings that will likely emerge in this band.

The Commission also sought comment on an alternative transition plan. In the event the proponent-driven transition to a new band plan fails, the Commission has proposed a plan under which licensees would exchange their licenses for bidding credits for use in any subsequent Commission auction. Nextel would consider not opposing the proposed alternative transition mechanism if the Commission permits licensees to

transition their own facilities in lieu of returning their licenses in exchange for bidding credits.

The time to auction unassigned spectrum should vary depending on the type of spectrum involved. For BRS BTA authorizations that have been cancelled, the Commission should hold a new auction as soon as practicable. For EBS white space or voluntarily returned authorizations, however, the Commission should refrain from auctioning this spectrum until after the transition has occurred. After the band transition is complete, licensees will know which geographic service area licensees have self-transitioned and will have better information about the availability of spectrum in the band.

Nextel supports licensing new LBS and UBS blocks together; however, the MBS authorization should be licensed separately. Licensees will want spectrum either in the MBS, or in the LBS/UBS. They generally will not want spectrum in both the high-site and low-site sections of the band. To minimize post-auction transaction costs, the Commission's auction groupings should reflect the market reality that seems likely to emerge.

While Nextel can also support moving from the current system of call-sign-based regulatory fee assessments to a new system with assessments based on each carrier's covered population (measured in MHz-pops), the Commission must establish clearer definitions of each licensee's geographic service area (GSA) to avoid inequity that would result from licensees over- or under-counting their MHz-pops. Unless the Commission clarifies its definition of incumbents GSA, licensees will not be able to reliably determine

their MHz-pops and Nextel must advocate retaining the call-sign based regulatory fee assessment.

Finally, Gulf Service Area operations should be authorized only upon a showing that no harmful interference will result to land-based BRS and EBS licensees. To that end, any Gulf Service Area boundaries should end twelve miles from the United States shoreline.

Adopting these recommendations will help ensure greater access to spectrum and eliminate the uncertainty that has diminished commercial and non-profit use of the BRS-EBS spectrum. Clear rules consistent with longstanding Commission precedent will help ensure the public achieves the full benefit from the Commission's recently adopted reform efforts in this band.

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**COMMENTS OF
NEXTEL COMMUNICATIONS**

I. Introduction

Nextel Communications submits these comments in response to the *BRS/EBS Further Notice*.¹ Nextel supports the Commission's continuing effort to improve the rules and policies governing the 2.5 GHz band. Continuing the Commission's ongoing

¹ *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Band*, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 14165 (2004) (*BRS Report and Order* or *BRS Further Notice* as relevant).

reform of the BRS/EBS regulatory regime will help ensure the public achieves the full benefit from the Commission's recently adopted *BRS Report and Order*.

II. BRS and EBS Licensees Should Meet a Substantial Service Performance Requirement for License Renewal and Receive a Fair Opportunity to Meet this Obligation on a System-Wide Basis under the Reconfigured Band Plan.

In its *BRS/EBS Further Notice*, the Commission proposed to apply a “substantial service” performance requirement for BRS-EBS license renewal.² The Commission found that applying a substantial service standard in this case would offer a flexible, market-based approach to encourage the highest valued use of this band, the widest deployment of broadband services, and the swiftest deployment of new technologies and services.³

Nextel agrees. First, the Commission long ago concluded that strict construction requirements are “neither practical nor desirable as a means of meeting Section 309(j)’s objectives regarding warehousing and rapid deployment.”⁴ Because the Commission does not know the specific types of service or services to be provided, the Commission has held that that “it would be difficult to devise specific construction benchmarks.”⁵ Second, the Commission has held that applying a broad substantial service requirement provides licensees with more flexibility to determine how best to implement their business plans.⁶ Licensees can focus on actually providing service to consumers, rather

² “Substantial service” generally means service that is sound, favorable, and substantially above a level of mediocre service that would barely warrant renewal. *See e.g.* 47 C.F.R. §§ 22.503(k)(3), 27.14, 90.685(b), 95.381, 101.527(a), 101.1011(a).

³ *BRS/EBS Further Notice*, 19 FCC Rcd at ¶¶ 320-321.

⁴ *Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service*, 12 FCC Rcd 10785, 10482 (1997).

⁵ *Id.*

⁶ *Amendments to Parts 1, 2, 27 and 90 of the Commission's Rules to License Services in the 216-220 MHz, 1390-1395 MHz, 1427-1429 MHz, 1429-1432 MHz, 1432-1435 MHz,*

than meeting inherently arbitrary milestones requirements divorced from real-world market developments. The Commission, therefore, should apply a substantial service standard for renewal in this case.

At the same time, the Commission should recognize that the 2.5 GHz band is undergoing a complicated transition from a highly inefficient interleaved structure to a somewhat more rational, more contiguous bandplan that groups like uses together.⁷ Once the lengthy transition plan is complete, the band will offer the promise of allowing carriers to offer innovative broadband services, including both fixed and mobile multimedia communications, to the public. In light of the complicated transition process, however, the Commission should offer BRS and EBS licensees a fair opportunity to demonstrate substantial service under the newly reconfigured band plan. The Commission should not attempt to measure substantial service until licensees receive relief from the impediments that the existing band plan imposes on them. Measuring substantial service during the transition would require licensees to needlessly invest in facilities that do nothing more than preserve their licenses pending completion of the transition. Rather than force licensees to redirect investment into facilities that serve as nothing more than regulatory placeholders pending transition to the new band plan, the Commission should encourage investments in facilities actually designed to serve the public. To ensure the market – not regulation – drives facilities-based investment, the

1670-1675 MHz, and 2385-2390 MHz Government Transfer Bands, 17 FCC Rcd 9980, 10010 (2002).

⁷ See generally, e.g., *BRS/EBS Realignment Order*, 19 FCC Rcd at ¶¶ 21-22 (“The current interleaved band plan, coupled with the current adjacent channel interference protection rules, effectively precludes any licensee from providing broadband service unless consent is received from the licensee of the interleaved channel group This hampers the ability of individual MDS and ITFS licensees to deploy broadband services by giving adjacent channel licensees veto power over any such offering.”).

Commission should provide that licensees whose license renewal terms expire prior to five years after the conclusion of transition are automatically eligible for renewal, subject to a showing of substantial service no later than five years after the transition plan is complete.

The Commission should also measure substantial service on a per system basis, not a per call sign or a per channel basis. As the Commission noted in its *BRS/EBS Report and Order*, until recently the 2500–2690 MHz band was comprised of twenty 6 megahertz EBS channels and eleven 6 megahertz BRS channels.⁸ Once the *BRS/EBS Report and Order* is fully implemented, the band will be consolidated and then segmented into three parts, consisting of a Lower Band Segment (LBS), extending from 2496-2572 MHz, and comprised of twelve 5.5-megahertz-wide channels, one 6-megahertz-wide channel, and one 4-megahertz-wide guard band; a Middle Band Segment (MBS), extending from 2572-2614 MHz, and comprised of seven 6-megahertz wide channels; and an Upper Band Segment (UBS), extending from 2614-2690 MHz, and comprised of twelve 5.5-megahertz wide channels, one 6-megahertz-wide channel, and one 4-megahertz-wide guard band.⁹ While the *BRS/EBS Report and Order* helped rationalize the band plan for these services by eliminating interleaved channels and grouping like uses together, the bandplan that the Commission adopted in the *BRS/EBS Report and Order* remains exceptionally complex.¹⁰

Without delving into too much detail, each BRS and EBS channel remains individually licensed with geographic areas of wildly different sizes based on decades of

⁸ See *BRS/EBS Report and Order*, 19 FCC Rcd at ¶ 21.

⁹ See *id.*

¹⁰ See generally, *e.g.*, *BRS/EBS Report and Order*, 19 FCC Rcd at ¶ 37.

stop-and-start regulatory reform efforts. In most cases, several licenses in the same general region of the country will use a single channel with each license serving a separate, often irregularly shaped geographic sub-area. Under this Swiss-cheese geographic service area licensing scheme, a great many different licensees hold different and sometimes overlapping areas within a single coterminous geographic region. Unlike most other services, therefore, a prospective provider of wireless broadband services can only offer service in the BRS/EBS band using channels from various sources, including BTA white spaces licenses, incumbent BRS stations, and leased BRS or EBS capacity. Focusing on the level of service provided by any individual license or on an individual channel would ignore the random, multi-source method by which BRS licensees must serve the public. Measuring substantial service on a per call sign or per channel basis may also result in a finding that a licensee has not diligently deployed service when, in fact, a large number of consumers in a given geographic area have access to the service that the licensee offers. Therefore, where a licensee demonstrates that it operates a multi-channel system, the licensee should be deemed to provide substantial service if the multi-channel system, taken as a whole, satisfies the substantial service requirement. Basing substantial service on system-wide compliance with the standard is the only rational way of measuring actual service to consumers for a multi-channel system in light of the historically anomalous licensing scheme for this band.

III. All Licensees That Are Not Part of An Initiation Plan Should Have an Opportunity to Pay for Their Own Transition in Lieu of Receiving Bidding Credits.

The Commission proposed an alternative transition mechanism for those geographic areas in which proponents do not file timely Initiation Plans. Under this

alternative transition mechanism, the Commission would essentially dissolve existing spectrum assignments; issue incumbent EBS and BRS licensees modified licenses to continue current operations until new licensees give notice of intent to offer incompatible new services; issue transferable bidding-offset credits in exchange for the dissolved licenses; and auction new licenses in the relevant geographic area under the newly adopted band plan.¹¹

If the Commission adopts such a plan, it must offer all BRS/EBS licensees the opportunity to retain their licenses and pay for their own transition in lieu of receiving bidding credits if no Initiation Plan is filed for the affected licensee's geographic region. Under this proposal, if a BRS or EBS licensee were not subject to a valid Initiation Plan filed by the deadline for submitting those plans, then the licensee would have a reasonable time in which to cease all transmissions under the old bandplan and commence operations under the new bandplan. Licensees that have not received a transition plan from a proponent should have a choice: either they can receive bidding credits for a future auction consistent with the Commission proposal, or they can retain their licenses and pay their own transition costs to immediately transition to the new band plan. Whichever path a licensee chooses, this proposal would have the extremely beneficial result of ensuring that, as of a reasonable time from the transition deadline, all licenses not already scheduled for comprehensive transition would comply with the new bandplan – either through voluntary transitions, or by discontinuing operations in exchange for bidding credits to use in a future spectrum auction.

¹¹ See *BRS/EBS Further Notice*, 19 FCC Rcd at ¶¶ 266-288.

The Commission should also act now to prevent disputes among the parties to lease agreements for BRS and EBS spectrum. Licensees that return their licenses in exchange for bidding credits may be liable for contractual damages under lease agreements if the licensee/lessor voluntarily eliminates the subject of the lease agreement between the two parties. The Commission can help avoid subsequent legal proceedings in state or federal courts by prohibiting lessors with lease agreements from submitting their licenses to the Commission in exchange for bidding credits unless they either hold express authority to do so under the lease, or obtain the express written consent of the lessee.

IV. The Time for the Commission to Auction Unassigned Spectrum Should Vary Depending on the Type Of Spectrum Involved, and Future Auctions Should Use Geographic Service Areas Consistent with Past Auction Assignments.

The Commission sought comment on when to assign new BRS and EBS licenses by auction for unassigned spectrum subject to timely filed Initiation Plans.¹² Specifically, the Commission sought comment on whether to conduct a single auction of licenses for all available spectrum in the band after the close of the three-year period for filing Initiation Plans, whether the spectrum was unassigned, cleared for purposes of transitioning to the new band plan, or relinquished by incumbents voluntarily clearing already transitioned spectrum.¹³

The time for the Commission to auction unassigned spectrum should vary depending on the type of spectrum involved. For BRS BTA authorizations that have been cancelled due to non-payment of installment payments or for other reasons, the Commission should hold a new auction as soon as practicable. Given the high likelihood

¹² See *BRS/EBS Further Notice*, 19 FCC Rcd at ¶¶ 266-288.

¹³ *Id.*

that the BRS BTA holder will be the proponent who funds the EBS transition to the new bandplan, the sooner the Commission identifies a new BRS BTA holder the sooner the transition in that BTA can occur at no cost to the EBS licensees. For EBS white space or voluntarily returned authorizations, however, the Commission should refrain from auctioning any this spectrum until after the date certain for transition has occurred and it is known which licensees have self-transitioned. Conducting *ad hoc* auctions for the limited EBS assignments that are available would further complicate transitions and would increase the number of EBS incumbents that a proponent would need to transition.¹⁴ *Ad hoc* auctions would also eliminate opportunities for EBS licensees to consolidate holdings across channels and geographic areas as needed to provide more effective, more comprehensive service to the public.

Regardless of the timing of subsequent auctions, however, all spectrum assignments in this band should proceed on a BTA-area basis.¹⁵ Adopting a BTA geographic area will ensure that any new spectrum remains consistent with the BRS licensing that the Commission has used for many years.¹⁶ Using BTA-sized geographic

¹⁴ If the Commission nevertheless choose to immediately auction unlicensed or reclaimed EBS white space, the Commission should adopt rules to avoid creating unfair and improper incentives for new EBS white-space licensees to game the transition process. At a minimum, the Commission should provide that new EBS white space licensees must operate consistent with the new, post-transition band plan, or may only operate consistent with the current bandplan subject to the understanding that they are ineligible to be transitioned to the new bandplan at the proponent's expense.

¹⁵ To remain consistent with the BTA boundaries that the Commission originally auctioned in this service, the Commission should use a definition of BTA geographic areas as of the original MMDS BTA auction date. Using any revised definition of BTA boundaries that might have occurred since then could create gaps or overlaps in BTA areas that would complicate licensing.

¹⁶ Rand McNally holds a copyright over the BTA concept. In its capacity as a member of the Wireless Communications Association, International (WCA), Nextel has commenced discussions with Rand McNally to permit licensing of the BTA concept for use during the

areas in subsequent auctions would also eliminate the prospect of overlapping geographic areas or gaps between the existing BTA-based geographic area and whatever other geographic area the Commission might choose. By using the same geographic area that the Commission has always used, licensees would not need to engage in the process of selling, buying, and exchange geographic areas on the secondary market.

V. While New LBS and UBS Blocks Should be Auctioned Together to Promote the Accumulation of Contiguous Spectrum, New MBS Blocks Should Be Auctioned Separately.

The Commission sought comment on the proper grouping of frequency blocks in an auction of new LBS, MBS, and UBS licenses. One option was to license each block in each band segment separately. Another option was to license three LBS or UBS blocks with an MBS block in the same groups incumbents are entitled to receive pursuant to a proponent-initiated transition, *i.e.*, license an “A block” of three LBS blocks and one MBS block at the lower end of the respective segments.¹⁷

Nextel supports licensing new LBS and UBS blocks together as a unit. The MBS authorization, however, should be licensed separately. The LBS and UBS blocks are designed and licensed for low-site, low-power operations, and the MBS block is designed and licensed for high-site, high-power operations. Operators will generally opt for one type of deployment or another; therefore, operators are unlikely to want to acquire both high-site and low-site licenses in a single auction. Carriers will place more value on the LBS and UBS spectrum if they can acquire more contiguous spectrum by bidding on a group of three LBS or UBS channels as opposed to acquiring individual LBS and UBS

transition. Rand McNally and Nextel continue to actively discuss this issue, and Nextel believes a licensing agreement can be reached.

¹⁷ See *BRS/EBS Further Notice*, 19 FCC Rcd at ¶ 279.

channels at auction; however, LBS/UBS-based carriers are unlikely to place additional value on a license group if an MBS channel is introduced into a package with the LBS or UBS channel blocks because the resulting package will not increase the overall amount of contiguous spectrum that a carrier can use for a single system deployment.

The Commission also sought comment on whether parties were indifferent to the specific frequencies they receive, so long as they are authorized to use frequencies with particular characteristics, such as uniform frequencies across multiple license areas.¹⁸ For operational reasons, parties must continue to seek specific frequencies. As indicated above, the tortured evolution of the BRS and EBS licensing scheme requires operators to seek specific channel blocks in specific markets to achieve the optimum spectrum position they need to provide service. Thus, the Commission should plan its auction processes by recognizing that different operators will value different channels differently in light of their unique spectrum positions in individual markets throughout the country.

VI. Regulatory Fees for the 2.5 GHz BRS Spectrum Could Be Assessed Equitably on a MHz-pops Basis, Provided that the Commission Defines Each Licensee's GSA With Greater Specificity.

The Commission sought comment on how to alter the method by which it assesses the annual regulatory fees that BRS licensees must pay the Commission. Nextel agrees with the Commission's basic assessment that it should assess fees on licensees based the scope of a licensee's authorized spectrum use.¹⁹ Nextel also agrees with the Commission's goal of adopting a new fee methodology that allows licensees "to

¹⁸ See *BRS/EBS Further Notice*, 19 FCC Rcd at ¶ 280.

¹⁹ See *BRS/EBS Further Notice*, 19 FCC Rcd at ¶ 355.

determine their fee obligations through a simple calculation, based predominantly on fixed, known variables.”²⁰

While Nextel can also support moving from the current system of call-sign-based regulatory fee assessments to a new system with assessments based on each carrier's covered population (measured in MHz-pops), the Commission must first establish clearer definitions of each licensee's geographic service area (GSA) to avoid inequity that would result from licensees over- or under-counting their MHz-pops.²¹ As indicated in Nextel's petition for reconsideration in this docket, the Commission has not adequately defined each licensee's GSA and has not addressed precisely how to resolve GSA disputes in a variety of settings.²² Licensees cannot determine their covered population if they do not know exactly how much territory their license covers. GSA boundaries are a necessary component in determining each carrier's MHz-pops. If the Commission does not itself define each licensee's GSA boundaries with greater specificity, even the most well intentioned carriers are likely to arrive at different, inconsistent conclusions about the MHz-pops that they control. These inconsistent conclusions will lead to inconsistent, arbitrary regulatory fee assessments that rely more on each carrier's best guess concerning its covered territory as opposed to the “fixed, known variables” that the *BRS/EBS Further Notice* sought to provide licensees.

If each licensee's GSA boundaries were better defined and if common measures of population were used, however, a MHz-pops assessment by the licensee offers an

²⁰ *Id.* at ¶ 356.

²¹ *Id.* at ¶¶ 351-359. To minimize reporting variations among licensees, the Commission should also specify that licensees must use the most recent census data available, which is currently from the year 2000.

²² *Partial Petition for Reconsideration of Nextel Communications*, WT Docket No. 03-66 (filed Jan. 10, 2004).

equitable method of determining each licensee's liability. Unlike other alternatives such as a square kilometer approach, this method would account for variations in geographic area size, population density, and available spectrum and would not place rural licensees at a disadvantage with respect to regulatory fee assessments. Properly calculated, MHz-pops would be fair to small licensees, large licensees, rural licensees, and urban licensees because it considers both population and geographic extent of coverage.

If the Commission does not affirmatively define GSAs, however, then Nextel opposes a MHz-pops assessment because no reliable way of determining each carrier's regulatory fee liability exists. Unless better GSA definitions exist, the Commission should retain the call sign-based regulatory fee assessment. The call-sign approach may result in some inequity in some situations, but any potential limitations of this approach are far superior to the wholesale inaccuracy that would exist with the MHz-pops approach if the Commission fails to define the essential GSA element of the MHz-pops equation.

VII. Unless the Outer Boundaries of a Gulf of Mexico Service Area Are Located Far From Land, Operations on BRS-EBS Channels in the Gulf May Cause Harmful Interference to Land-Based, Co-Channel Licensees.

The Commission renewed its request for comment on its proposal to create a Gulf Service Area for MDS services, including its proposal to exclude ITFS licensees from the Gulf Service Area due to lack of interest in providing EBS service to this region. The Commission also sought additional comment in particular on the proper boundary line between the Gulf Service Area and the shoreline. Specifically, the Commission sought

comment on whether the Gulf Service Area boundary, if established, should be at mean high tide or twelve miles from the shore.²³

If a Gulf Service Area is established, its boundaries should end well before the shoreline. The Gulf Service Area should exclude the larger of a land-based BRS-EBS licensee's authorized GSA or the area twelve miles from the shoreline at mean high tide. Excluding areas within roughly twelve miles of the shoreline will mitigate the potential for Gulf Service Area operations to interfere with land-based BRS and EBS operations. As the Commission has observed, the propagation characteristics of signals over large bodies of water —“ducting” along the signal path – increases the interference potential to geographically adjacent licensees in ways that are extremely difficult to predict. Without sufficient geographic separation, activity in the Gulf region may result in harmful interference to land-based operations contrary to the licensed parameters of the BRS facilities along the Gulf of Mexico.

²³ *BRS/EBS Further Notice*, 19 FCC Rcd at ¶¶ 360-367.

VIII. Conclusion

Adopting the rule changes discussed above will help the Commission ensure that the public achieves the full benefit from the Commission's recently adopted reform efforts in this band. The BRS/EBS band is uniquely complex. Adopting the recommendations discussed here will advance the Commission's ongoing reform efforts in this band and help licensees in both the BRS and EBS services provide new, multimedia services to consumers.

Respectfully submitted,

NEXTEL COMMUNICATIONS

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